

Hearing:
May 6, 1998

Paper No. 29
TDC/RS

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB

MARCH 4, 99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Taylor Made Golf Company, Inc.
v.
R & M Golf Company dba Triumph Golf Company

Opposition No. 100,296
to application Serial No. 74/640,224
filed on March 1, 1995

Thomas C. McDonough of Altheimer & Gray for Taylor Made
Golf Company, Inc.

Larry L. Coats of Rhodes, Coats & Bennett, L.L.P. for R & M
Golf Company dba Triumph Golf Company

Before Simms, Hohein and Hairston, Administrative Trademark
Judges.

Opinion by Simms, Administrative Trademark Judge:

Taylor Made Golf Company, Inc., a Delaware corporation,
has opposed the application of R & M Golf Company, doing
business as Triumph Golf Company, a Florida corporation, to
register the mark BALLOON SHAFT ("SHAFT" disclaimed) for

golf shafts and golf clubs.¹ In the notice of opposition, opposer asserted that since 1979 it has been making, selling and distributing golf equipment including golf clubs; that opposer's clubs have always featured a distinctive construction and performance; that opposer's clubs are among the most popular clubs used by professional and amateur golfers; that since December 1994 opposer has been using the mark BUBBLE for golf clubs and golf club shafts and that opposer has developed widespread goodwill and recognition of that mark; that opposer owns a registration of this mark for golf clubs and golf club shafts (Registration No. 1,926,587, issued October 10, 1995); that opposer has also used the mark BUBBLE SHAFT on its golf clubs and golf club shafts; and that applicant's mark BALLOON SHAFT so resembles opposer's previously used and registered mark BUBBLE as to be likely to cause confusion, to cause mistake or to deceive. In its answer applicant has denied the essential allegations of the notice of opposition.

Each party has taken testimony and submitted a notice of reliance, opposer having relied upon certain portions of a discovery deposition of applicant's president, while applicant has relied upon dictionary definitions of the

¹ Application S.N. 74/640,224, filed March 1, 1995, based upon applicant's bona fide intention to use the mark in commerce under Section 1(b) of the Act, 15 USC §1051(b).

words "balloon" and "bubble." The parties have submitted briefs and an oral hearing was held.²

Opposer's Record

According to the testimony of Mr. George Montgomery, opposer's president and chief executive officer, opposer introduced the BUBBLE golf clubs in October 1994³ with the first interstate shipment being made in December of that year. Mr. Montgomery testified that opposer's registration of the mark BUBBLE for golf clubs and golf club shafts was valid and subsisting, and that the allegation of opposer's ownership in the notice of opposition was true. Montgomery dep., 36. Opposer uses the mark BUBBLE with its other trademarks, such as BURNER and CHAMPAGNE BURNER. The BURNER BUBBLE mark, for example, identifies a line of metal woods. Mr. Montgomery testified that the BUBBLE or BUBBLE SHAFT clubs account for approximately 90% of opposer's sales. In 1996, opposer spent around \$8 million on advertising and sold over 1.6 million shafts under the mark BUBBLE. Opposer advertises its goods in magazines and trade publications, on television, by means of trade shows and on the Internet

² While opposer's counsel objected to the alleged leading nature of the questions posed to applicant's witness, opposer did not reiterate this objection until its reply brief. Applicant, therefore, had no opportunity to argue this point in its brief. We consider these objections to have been waived.

Also, on page five of its reply brief, opposer has made reference to certain of applicant's interrogatory answers. Suffice it to say that these responses are not of record in this case.

computer network. Opposer's goods are sold through golf specialty retailers including "green grass" pros and in golf discount stores.

Opposer has made of record copies of articles wherein opposer's pleaded mark has received media attention. According to Mr. Montgomery, in 1995, more tournaments were won using the BURNER BUBBLE driver than any other.

Opposer's exhibits include copies of federal court orders involving opposer's attempts to protect its intellectual property, including its patents and trademarks with respect to its golf clubs. Pursuant to an agreement between opposer and certain third parties, for example, a federal district court in the Northern District of Ohio entered a permanent injunction banning the use by the defendants of the mark BALLOON. A federal district court in South Carolina also entered an order enjoining third-party use of such marks as SCORCHER, BOMBER, BUMBER and BALLOON. Opposer has also made of record a copy of a letter from the U.S. Customs Service indicating seizure of third-party golf clubs bearing the marks BALLOON SHAFT and TOUR MADE, stated to be confusingly similar to BUBBLE SHAFT and TAYLOR MADE. See opposer's Exhibit 5.

With respect to the marks involved in this case, Mr. Montgomery testified, at 33:

³ The evidence shows that opposer frequently uses the term "SHAFT" with the mark BUBBLE on the goods.

[T]he word "balloon" and the word "Bubble" are similar in suggesting a spherical shape filled with air that is meant to suggest the shafts are different in shape from other golf club shafts, and that they're so similar in meaning that they would confuse consumers.

In this regard, the exhibits of record show that opposer's shafts have an assertedly distinctive narrowing at the top of the shaft immediately below the grip.

Opposer's record also consists of reliance upon certain discovery deposition responses of applicant's president and majority owner, Matthew Adams. Among other things, he testified that, while opposer's mark BUBBLE or BUBBLE SHAFT is not suggestive of opposer's goods, applicant's mark BALLOON is suggestive of the shape or contour of applicant's golf clubs.

Applicant's Record

According to the testimony of Mr. Julian Bunn, III, the president of a golf retail business (Carolina Custom Golf), and who has been in golf retailing for 20 years, a set of opposer's golf clubs costs between \$1200-\$1500 whereas a set of applicant's clubs retails for between \$100 and \$500. Mr. Bunn testified that opposer's golf clubs are considered top of the line. The average cost of applicant's BALLOON SHAFT wood, on the other hand, is between \$59 and \$79 retail. Mr. Bunn also testified that golf purchasers are generally careful and discriminating and are not impulse purchasers.

He further testified that the term "BALLOON" as used on applicant's clubs connotes a "bulging out" of the shaft.

Q. Do you understand the function of the bulge?

A. Of this bulge (indicating)?

Q. Yes

A. Yes, sir.

* * * * *

Q. Can you explain that to us?

A. Yes, sir. This is an overlay that's put on the shaft to enable the butt section of the shaft to be stiffer so that it's more tip flexible, enabling the ball to get airborne a little quicker, which is better for the clientele that Triumph sells its golf clubs to. Tends to be not an excellent golfer, generally.

Q. Are there other manufacturers that manufacture a golf shaft that includes a bulge or a swell in it?

A. Oh, absolutely. Bulge and swells are everywhere right now.

Q. For example, does Spalding make a shaft that has a bulge or swell?

A. They do.

Q. And can I ask you: Do you know what Spalding calls its bulging shaft?

A. It's called Muscle.

Q. Can you identify a few more other manufacturers that make shafts that have a bulge or a swell in them?

A. Yes, sir. The Cobra IQ system is in the -- the iron has a swell in the tip section. The Lynx Flare has a swell in it, in the lower section. The Goldwin Large Butt has a swelling in the butt section, extreme butt, this part (indicating).

And then there are a lot of shaft manufacturers that are making bulged shafts of one variety or other with bulges--in some cases, as many as three bulges in a shaft.

Bunn dep., 20-21. Finally, Mr. Bunn testified that there

have been no instances of actual confusion⁴ and that there is no likelihood of confusion between the respective marks.

Arguments of the Parties

It is opposer's position that the respective marks are similar in appearance, connotation and commercial impression and that, when used on substantially identical goods sold in the same channels of trade, confusion is likely. Opposer points to the level of sales and advertising as demonstrating that its mark BUBBLE is famous. In fact, counsel states that arguably this mark "is the most heavily promoted and most famous trademark ever used on a golf club shaft." Brief, 10. Opposer also points to the statement of applicant's president that the mark BUBBLE (or BUBBLE SHAFT) indicates opposer. With respect to the parties' marks, opposer argues that both marks begin with a "B" and include a repeated consonant. Also, both words, according to opposer, suggest a spherical shape filled with air. Both terms, opposer argues, suggest shafts different in shape from other golf club shafts. Finally, opposer notes that it has successfully prevented other entities from selling products under similar marks.

⁴ Although applicant has filed on an intent-to-use basis, applicant has begun use of its mark.

Applicant, on the other hand, argues that the respective marks are different in sound, appearance and meaning, that the purchasers of golf clubs are sophisticated and knowledgeable and that the expensive nature of golf clubs leads to the conclusion that confusion is unlikely. Also, applicant contends that the respective terms "bubble" and "balloon" are not used interchangeably. With respect to the letter from the U.S. Customs Service, applicant objects to this evidence on the basis of hearsay⁵ and to the court judgments of record. Applicant argues that no weight should be given to such evidence because applicant was not a party to any of the proceedings and its mark has not been the subject of federal litigation. These actions, therefore, have no probative value, according to applicant.

Discussion and Opinion

As noted, opposer has made of record its pleaded registration. Therefore, there is no issue with respect to priority of the mark BUBBLE. King Candy Co. vs. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). In any event, the record establishes opposer's use of this mark (as well as the mark BUBBLE SHAFT) since before the filing date of applicant's application.

⁵ Applicant's attorney did not appear for the taking of opposer's testimony and, therefore, was not present to object to any of the testimony or exhibits offered. The objection, not having been timely raised, is accordingly considered to be waived.

Because the descriptions of goods in both opposer's pleaded registration and in applicant's application are substantially the same, there is also no issue with respect to the similarity of the goods of the parties. While the evidence of record does point to specific differences in the nature and quality of the respective goods, because these goods are identically described in the respective application and registration, for our purposes we must assume that the goods are the same. *Octocom System, Inc. vs. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990). Therefore, of course, the channels of trade and purchasers must also be considered essentially the same.

The only real issue before us is whether applicant's mark BALLOON SHAFT and opposer's marks BUBBLE and BUBBLE SHAFT are so similar that, as applied to golf clubs and golf club shafts, confusion is likely. While there are obvious similarities in these words (each begins with the letter "B", each begins with a two-syllable word and has a double consonant in the middle of the first word), we believe that applicant's mark projects a sufficiently different commercial impression from each of opposer's marks that confusion is unlikely. These words have different meanings, which we believe would not be lost upon potential purchasers. While the parties' marks may be somewhat

suggestive of the contour of a golf club shaft, a bubble would be understood, we believe, to refer to a small body of air within a thin film of liquid whereas a balloon would be understood to mean, typically, a rubber or elastic structure, often colorful, filled with air or gas. These marks also have obvious differences in sound and appearance.

While we have considered the record and argument with respect to the renown of opposer's mark, we are not convinced that this record establishes that its mark BUBBLE is "famous," only that it is a strong one that is relatively well-known in the field. In any event, we think it is significant that the goods involved in this case are not inexpensive items subject to casual or impulse purchasers. Purchasers spending several hundreds of dollars on golf clubs are likely to exercise some degree of care in making their purchases. We agree with applicant, therefore, that purchasers of golf clubs may be considered relatively careful and discriminating.

The fact that there have been no instances of actual confusion has been given little weight in view of the lack of evidence concerning the level and scope of distribution and sales of applicant's goods, and therefore the opportunity for possible confusion. Also, the evidence concerning the consent judgments involving third parties has little, if any, probative value.

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Accordingly, we find that applicant's mark is sufficiently different from opposer's marks that, even when used on legally identical goods, confusion is unlikely.

Decision: The opposition is dismissed.

R. L. Simms

G. D. Hohein

P. T. Hairston
Administrative Trademark
Judges, Trademark Trial
and Appeal Board